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| IN THE MATTER OF: | : | |
| | : | |
| PAUL H. ANDREAE, | : | DATE:3/31/97 |
| Complainant | : | |
| | : | Case No. 95-STA-24 |
| V. | : | |
| | : | |
| DRY ICE, INCORPORATED | : | |
| Respondent | : | |

APPEARANCES:

Paul H. Andreae, *Pro Se*

Glen B. Kulkowski, Esq.
For the Respondent.

BEFORE: MOLLIE W. NEAL
Administrative Law Judge

## RECOMMENDED DECISION AND ORDER

This case arises under the Surface Transportation Assistance Act of 1982 ("the Act" or "STAA"), 49 U.S.C. §2305 *et seq*., and the regulations promulgated thereunder at 29 C.F.R. Part 1978. Section 405 of the Act provides protection from discrimination to employees who report violations of commercial motor vehicle safety rules or who refuse to operate a vehicle when such operation would be in violation of those rules.

## STATEMENT OF THE CASE

Paul H. Andreae (“Complainant”) filed a complaint with the Occupational Safety and Health Administration, United States Department of Labor, on December 14, 1994, alleging that the Dry Ice, Incorporated (“Respondent”) discriminated against him in violation of Section 405 of the Act. The Complainant contends that he was discharged due to his expression of safety concerns to management. The Secretary of Labor, acting through a duly authorized agent, investigated the complaint and on February 8, 1995 determined that the Complainant failed to prove that the Respondent discharged him for his engaging in protected activities. Accordingly, the complaint was dismissed.

The Complainant filed written objections to the Secretary's findings on March 9, 1995 and requested a hearing before an Administrative Law Judge. A formal hearing was held before the undersigned, at which time the parties were afforded full opportunity to present evidence as provided in the Act and the regulations issued thereunder.

Following the hearing, Claimant has submitted several letters in which he alleges facts which were not presented during the hearing and for which there is no supporting testimony or documentation in the record. Therefore, any factual representations that he makes in post-hearing correspondence to this Office will not be considered in reaching a determination herein. These post-hearing submissions do not appear to have been served upon Respondent or its attorney. Moreover, the opposing party has not had an opportunity to refute these allegations or otherwise cross examine Complainant or other witnesses with regard to these declarations. Complainant also submitted documents from the Department of Labor's investigation file, which include the "Discrimination Case Activity Worksheet, dated December 19, 1994, the notice of filing of the complaint by Mr. Andrea, and his four page statement of his complaint, signed and dated December 16, 1994. These documents have been received into the record as Complainant's exhibit 16.

The sole issue is whether the Complainant was discriminated against by the Respondent as a result of having engaged in a protected activity under the Act. Complainant alleges that he was terminated because of his safety complaints to Respondent's manager, and that his written notice to Respondent's manager regarding defective wiper blades and a loose mirror on the truck he was assigned to operate on December 6, 1994 was the ultimate cause of his termination. Respondent denies Complainant's termination was because of his safety complaints, and alleges that he was terminated because of his inadequate driving skills, as well as unauthorized use of the company's credit card, customer complaints about Complainant's conduct, the fact that he helped himself to another employee's lunch, use of profanity, and his argumentative attitude.

Based on my observation of the appearance and demeanor of the witnesses, and upon a thorough analysis of the entire record in this case, the arguments of the parties, applicable statutory provisions, regulations and relevant case law, I hereby make the following findings and conclusions.

## FINDINGS OF FACT

Respondent is a Milwaukee-based company engaged in the production, transportation and delivery of dry ice. In the regular course of this business, Respondent's employees operate commercial motor vehicles in interstate commerce principally to deliver dry ice.

Complainant was employed by Respondent from on or about November 29, 1994 until December 8, 1994.(Tr. 44). Complainant was hired by Respondent to work as a professional driver of a

commercial motor vehicle, to wit, a straight-axle truck with a gross vehicle weight rating in excess of 10,000 pounds. (Tr 44). At all times material herein, Complainant was an employee in that he was required to drive commercial motor vehicles weighing in excess of 10,000 pounds used on the highways in interstate commerce to transport dry ice, and that he was employed by a commercial motor carrier and in the course of his employment, directly affected commercial motor vehicle safety.

Complainant testified that, on the morning of December 6, 1994, he was assigned a Mercedes Model No. 1117 truck and was to drive from Milwaukee, Wisconsin to Wausau, Wisconsin to deliver a shipment of dry ice. While en route to Wausau, he encountered extremely icy conditions, which he stated left him unable to see the road. He testified that he attempted to use the windshield wipers to clear ice from the windshield, but that they were ineffective. As a result, he testified he was forced to stop the truck fifty-one times to clear the windshield by hand. (Tr 11). When he stopped at a truck plaza in Oshkosh, Wisconsin to inquire about new wiper blades, his truck got stuck in mud. (Tr 11). Complainant testified that he solicited the assistance of another truck driver to pull his truck out of the mud in exchange for $75.00 of fuel, which he charged to Respondent's credit card. He stated that due to the weather, his trip to Wausau was longer than it normally would have been. He did complete the delivery and returned to Milwaukee. (Tr 13). On the return trip, he noticed that the mirror on the right side of the truck was loose. (Tr 13).

Upon returning to Milwaukee, Complainant informed Stan Jackson, Respondent's manager, about the wiper blades and indicated that he did not want to drive the Mercedes truck in extremely icy conditions until the wipers had been replaced. (Tr 13). Complainant testified that Mr. Jackson told him that, if he had any complaints about the truck, to put them in writing. Prior to leaving work on December 6, 1994, he wrote a note listing the defects with the truck, namely the defective wipers and loose mirror. (Tr 13).

On December 7, 1994, the day after returning from his delivery trip to Wausau, Complainant and Mr. Jackson inspected the wiper blades on the truck, and Mr. Jackson told him that new blades had been ordered. (Tr 14).

On December 8, 1994, Complainant was assigned to make local deliveries using the same Mercedes truck he drove two days before. Because the weather was not inclement, he had no problems with the truck. When he returned from making those deliveries, Complainant testified that Mr. Jackson terminated him, due to a bad attitude, his complaining, and an inability to work with other co-workers. (Tr 14).

Mr. Jackson, Respondent's Milwaukee manager, testified Respondent has a regular preventive maintenance program with Quality Truck Service for the repair and replacement of parts on its trucks on a scheduled basis. (Tr 47). Quality Truck Service also provides emergency service on Respondent's trucks. (Tr 44). Mr. Jackson testified that each truck used by Respondent's drivers has a folder containing the phone number of Quality Truck Service and drivers are instructed to call that number in case of a roadside emergency. (Tr 45). In the event there is a complaint about the condition of a truck, each driver is required to submit in writing any complaint, which is immediately transmitted to Quality Truck Service for the repairs. (Tr 48).

Mr. Jackson stated that to his knowledge, there was nothing wrong with the wiper blades or the right mirror on the Mercedes truck on December 6, 1994. In addition, Mr. Jackson testified that Claimant was required by the Department of Transportation to complete a pre-trip inspection of his truck; and that, had the wiper blades been defective, Complainant should not have attempted to travel to Wausau. (Tr 56-57).

Mr. Jackson testified that the Respondent's policy in emergency situations requires the driver to call Dry Ice's office, which would in turn notify Quality Truck Service to dispatch a vehicle to the site. Mr. Jackson inferred that Claimant's purchase of gasoline in exchange for the assistance of another truck driver did not conform to the company's emergency service procedures. (Tr 50).

Mr. Jackson acknowledged that it was "snowing and slushy" , on December 6, 1994, and that Complainant did report the blades were not working on his return from his trip to Wausau. (Tr 51). Upon receipt of Complainant's written complaint on December 7, 1994, Mr. Jackson called Quality Truck Service and personally brought the truck for replacement of the wiper blades on December 8, 1994. (Tr 51). A receipt from Quality Truck Service corroborates Mr. Jackson's testimony that new wiper blades were installed on December 8, 1994 on the Mercedes truck operated by Complainant two days previously. (CX 3). Mr. Jackson testified that he inspected the wiper blades prior to their replacement. He believed the blades "had been bent...physically handled" and stated that the technician who replaced the wiper blades noted that they were not just worn out from use, but had been bent by a person. (TR 52).

Mr. Jackson stated that the first two or three days after Complainant was hired, he asked Mr. Brent to accompany him on his runs, and had received a report from Mr. Brent that Complainant was an aggressive driver. He was also informed by Jonathan Brand that Complainant almost caused an accident, and then engaged in an exchange of profanity with the driver of the other vehicle. Based on these reports, Mr. Jackson rode with Complainant the day

after his Wausau trip, to observe his driving skills. He testified that Complainant made lane changes without giving turn signals on that day. Based on the prior reports regarding Complainant's driving and his own observations, Mr. Jackson testified he concluded that Complainant should not operate a truck for Dry Ice. (TR 53).

Mr. Jackson testified that Complainant's inadequate driving skills were the primary reason for his termination.[1] (Tr 54). In addition, he gave as reasons for terminating him the fact that he received three calls from Dry Ice's customers, who complained about Complainant's conduct and work habits, and asked that he not make future deliveries to their business establishments (Tr 54-55).

Another reason for Complainant's termination was his use of the company credit card. Mr. Jackson testified that Complainant was authorized to use the company credit card to purchase diesel fuel and oil for Respondent's trucks only. His use of the credit card for towing was unauthorized. Moreover, Complainant did not inform him that he had used the company credit card to pay for fuel in exchange for towing at the Oshkosh truck plaza. (Tr 49). Instead, he learned of the incident from one of the other employees (Tr 50).

Mr. Jackson stated that Complainant's reporting of the faulty wiper blades and loose mirror had nothing to do with his termination, as reports of faulty equipment by drivers "happens every day." (Tr 56). He testified that upon terminating Complainant, he told him that his driving skills were inadequate and he was not trustworthy, and that he did not possess the qualities in a driver Dry Ice needed. (Tr 56).

Finally, Mr. Jackson stated that Complainant's failure to conduct a pre-trip inspection and identify the condition of the wiper blades on the Mercedes truck prior to leaving for Wausau on December 6, 1994 violated the Department of Transportation's requirements. (Tr 56-7). He explained that, had the state police observed the defective wiper blades under the weather conditions on December 6th, the truck would have been tagged, and Complainant would have been unable to move it.

## Discussion

[1] Respondent introduced into the record a written unsworn statement of Wayne Slater, an employee, who stated that Complainant drank a can of his soda without permission. Also introduced into the record is the unsworn statement of Jonathan Brand, an employee, who stated that he was a passenger in a truck with Complainant and observed him driving in an unsafe manner.

Section 405(b) of the Act prohibits discharge, or any other manner of discrimination, against an employee "for refusing to operate a vehicle when such operation constitutes a violation of any federal rules, regulations, standards, or orders applicable to commercial motor vehicle safety or health...." 49 U.S.C. §31005. The initial burden is on complainant to establish a *prima facie* case of retaliatory discharge. To do so, the complainant must demonstrate that: (1)he engaged in some activity protected under the Act; (2) the employer knew of the protected activity, and that the employer took some adverse action against him; and (3) there was a causal link between his protected activity and the adverse action of his employer, i.e. it was likely the adverse action was motivated by the protected activity. *Anderson v. Jonick & Co., Inc.*, 93-STA-6 (Sept. 29, 1993); *St. Mary's Honor Center v. Hicks*, 113 S.Ct. 2742 (1993).

Under Section 405 of the Act, protected activity may consist of complaints or actions with agencies of federal or state governments, or it may be the result of purely internal activities, such as complaints to management relating to the violation of a commercial motor vehicle safety rule, regulation, standard, or order. 49 U.S.C. §2305.

Once the *prima facie* case is established, the burden of production shifts to the Respondent to present evidence sufficient to rebut the inference of discrimination. To rebut this inference, the employer must articulate a legitimate, nondiscriminatory reason for its employment decision. *Carroll v. J.B. Hunt Transportation*, 91-STA-17 (Sec'y June 23, 1992). The Respondent must simply present evidence of any legitimate reason for the adverse employment action taken against the Complainant. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). If the employer successfully presents evidence of a nondiscriminatory reason for the adverse employment action, the Complainant must then prove, by a preponderance of the evidence, that the legitimate reason proffered by the employer is a mere pretext for discrimination. The employee must prove that the asserted reason for the adverse employment action is false and that discrimination was the true reason for the adverse action. *Hicks*, *supra*.

Upon review of the record, I find that Complainant has failed to establish a *prima facie* case of discriminatory treatment under the STAA. Complainant has established that: (1) his written notification to Mr. Jackson of the defects with the Mercedes truck did constitute a protected activity under the Act; (2) he was the subject of adverse employment action; and (3) Respondent knew of the protected activity. However, he has failed to establish that there was a causal link between the protected activity and the adverse action of Respondent. *Moon v. Transport Drivers, Inc.*, 836 F.2d 226, 229 (6th Cir. 1987).

The facts are not disputed that, after returning from Wausau on December 6, 1994, Complainant informed Respondent's manager that the Mercedes truck had defective wiper blades and a loose mirror, and that he stated to Mr. Jackson that he was "not refusing to work or anything like that, but I don't want to drive that truck under those conditions again." (Tr 13). It is likewise undisputed that Mr. Jackson told him to put any complaints in writing, and that Complainant left a note describing the problems with the wiper blades and mirror.

Mr. Jackson's testimony is uncontroverted that Respondent's usual practice is that, in emergency situations, the driver is required to notify Respondent and assistance is dispatched to the site by Respondent. In the case of mechanical difficulties with company trucks, the driver is customarily required to submit in writing any complaints about the vehicle to management, which is then transmitted to Quality Truck Service for repairs. (Tr 48). I, therefore, find that the manner in which Complainant dealt with the emergency road service problem, on December 6, 1994, was not in conformance with Respondent's policy. I further find that Complainant's written note on December 7, 1994, was received consistent with the employer's policy relating to repairs, and employer acted in compliance with its policy, when it referred the matter to Quality Truck for repairs and the wiper blades were replaced on December 8, 1994. (Tr 29, 51).

Complainant does not dispute Mr. Jackson's testimony that he was not required to drive the Mercedes truck after he returned from the Wausau trip and prior to the time that the windshield wipers were repaired. Moreover, he admitted that he willingly drove the truck on December 8, 1994 prior to his termination.

Therefore, Complainant's operation of the vehicle with the defective wiper blades on December 7th did not constitute adverse action since, by his own admission, he was not forced to drive the truck prior to the repair of the defects. Further, Respondent took immediate corrective action on December 7, 1994 and the wiper blades were replaced on December 8, 1994. I note finally that the Secretary found that, in addition to having the wipers replaced, Mr. Jackson also had the right mirror adjusted and ordered a new mirror after receiving the Complainant's written notification. Thus, there were no defects in the Mercedes truck that were not immediately addressed, and the Complainant has not shown that anyone at Dry Ice was particularly disturbed by his report concerning the truck.

The Secretary has held that an inference that a Complainant's protected activities motivated the adverse action cannot be made where the Complainant's protected activities are encouraged and willingly complied with. *Ake v. Ulrich Chemical, Inc.*, 93-STA-41 (Sec'y Mar. 21, 1994). Although the fact that Mr. Jackson saw the Complainant's note the day before he was

terminated may appear to give rise to the inference of a causal connection, I find that this inference is not supported in the face of the compelling evidence that Mr. Jackson encouraged company drivers to write notes describing truck malfunctions as a common practice and that he willingly made arrangements with Quality Truck Service to repair the faulty blades and loose mirror upon reading the Complainant's note. *Ake*, *supra*; *Moon*, *supra*. Mr. Jackson's credible testimony establishes that requiring the Complainant to notify him in writing about the defective wipers and loose mirror was the established practice of Dry Ice for such matters, and his actions after finding the Complainant's written notification demonstrate that he took reasonable steps to correct the problem. Mr. Jackson's actions in asking the Complainant to write the note and in taking steps to have the problems with the truck addressed are clearly inconsistent with the Complainant's contention that he was terminated for writing the note. The Complainant has the burden of proof in establishing a *prima facie* case of discrimination under the Act, and I find that there is insufficient support for a finding that the Complainant's protected activities were a likely reason for his termination. Thus, I conclude that Complainant has failed to establish a *prima facie* case of discriminatory treatment under the STAA. *Hicks*, *supra*.

Moreover, even if it could be concluded that the Complainant established an initial inference of illegal conduct, Respondent has presented enough sufficient evidence to rebut any such inference. Respondent’s manager, Mr. Jackson, articulated several reasons for terminating the Complainant. In particular, I find Mr. Jackson’s testimony credible that he concluded that the Complainant's driving skills were inadequate after riding in a truck with him. Mr. Jackson reached his conclusion based on his observation that the Complainant made lane changes and turns without the use of a turn signal, and as a result Mr. Jackson determined that the Complainant should not be driving a truck for Dry Ice. (Tr 53). In addition, the statement of Mr. Brand indicates that on at least one other occasion, the Complainant operated a company truck in an unsafe and reckless manner. In the face of his evidence, I do not find Complainant's statement that Mr. Jackson did not tell him he was being terminated because of his inadequate driving skills to be credible. This reason, coupled with the fact that Respondent had received three customer complaints regarding Complainant within the first seven days of his employment, complainant’s failure to disclose to him that he had engaged in the unauthorized use of the credit card during an emergency situation, his failure to adhere to Respondent's policy for drivers by not calling into the office for the dispatch of Quality Truck Service when his truck became disabled in Oshkosh, and his unauthorized use the Respondent's credit card are legitimate non-discriminatory reasons for termination of an employee who had been on the payroll for such a short period. Thus, I find that, based on Mr. Jackson's credible testimony and

the corroborating statements of Mr. Brant and Mr. Slater, Dry Ice presented legitimate, non-discriminatory reasons for terminating its relationship with the Complainant. *Nance v. Polycrest, Inc.*, 90-STA-43 (Sec'y Aug 5, 1992); *White*, *supra*; *Hicks*, *supra*.

Moreover, the record is devoid of any convincing evidence which would establish that the manner in which Respondent addressed the infractions committed by Complainant was in any way different from its past actions with employees who had engaged in similar conduct. In the absence of such evidence, I find Claimant has failed to demonstrate that Respondent's proffered reasons for his termination were a mere pretext for discrimination.

## CONCLUSION

(1) The Surface Transportation Assistance Act governs the parties and the subject matter.

(2) Complainant demonstrated that he was engaged in protected activity when he filed complaints with Respondent's management regarding safety violations;

(3) Complainant demonstrated that he suffered adverse action when he was terminated.

(4) Respondent had knowledge of his complaints at the time of the adverse employment action;

(5) Complainant failed to present sufficient evidence to raise the inference that the protected activity was the likely reason for the adverse action;

(6) Respondent has demonstrated legitimate non-discriminatory reasons for its termination of Complainant.

(7) Claimant failed to demonstrate that Respondent's articulated reasons for his termination were pretextual.

## RECOMMENDED ORDER

For the foregoing reasons, IT IS HEREBY RECOMMENDED that the complaint of Paul Andrea be dismissed.

MOLLIE W. NEAL
Administrative Law Judge

**NOTICE**

This Decision and Order and the administrative file in this manner will be forwarded for final decision to the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. *See* 61 Fed. Reg. 19978 and 19982 (1996).

The parties may file with the Secretary briefs in support of or in opposition to the administrative law judge's decision and order within thirty days of the issuance of that decision unless the Secretary, upon notice to the parties, establishes a different briefing schedule.